No. 91-2178

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PATRICIA THOMPSON,
EDDIE THOMPSON, JR.,
Petitioners-Appellants-Plaintiffs,

vs.

MR. A. T. WOOD,
Respondent-Appellee-Defendant.

RESPONDENT'S REPLY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Is a County Clerk who records a deed to real property pursuant to a judicial act of a Circuit Judge liable under 42 U.S.C. 1983.

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No. 81-2178

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PATRICIA THOMPSON,
EDDIE THOMPSON, JR.,
Petitioners-Appellants-Plaintiffs,

vs.

MR. A. T. WOOD,
Respondent-Appellee-Defendant.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATUTORY AUTHORITIES

42 U.S.C. 1983 — Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

KENTUCKY REVISED STATUTES

KRS 382.110 (1) — All deeds, mortgages and other instruments required by law to be recorded to be effectual against purchasers without notice, or creditors, shall be recorded in the county clerk's office of the county in which the property conveyed, or the greater part thereof, is located.

KRS 426.575 — Conveyance by Master Commissioner shall not pass any right, until it has been examined and approved by the court; which approval shall be indorsed on the conveyance and recorded with it.

SUPREME COURT RULES

Sup. Ct. Rule 17 (1) — A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has

not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Sup. Ct. Rule 34 (6) — Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court.

COUNTERSTATEMENT OF THE CASE

The Petitioners brought this action against the Respondent on October 11, 1978, alleging that the Respondent willfully accepted and recorded a Deed in violation of State law and 42 U.S.C. 1983.

Underlying this lawsuit was the fact that the Petitioners' home was foreclosed on by a Bank. On May 27, 1977, a Judgment was entered in Kenton Circuit Court in favor of the Bank against Eddie Thompson, Jr., et al, the Petitioners, which directed the sale of the property. On June 21, 1977, the sale of the property took place. On June 27, 1977, the Master Commissioner's report on the sale was confirmed by the Judge of the Kenton Circuit Court. On June 28, 1977, the Master Commissioner's Deed to the property was produced in the Respondent's office for recording. A. T. Wood, the Respondent, thru a Deputy Clerk, accepted and recorded the Deed.

The District Judge for the Eastern District of Kentucky at Covington dismissed the case on June 26, 1980, and the Sixth Circuit Court of Appeals affirmed in an Opinion filed March 31, 1982. Petitioners' Motion for a rehearing en banc was also denied by the Sixth Circuit.

ARGUMENT

First, the Respondent must assert that the Petitioners have subjected the Respondent to a frivilous appeal by including in this petition "burdensom, irrelevant, immaterial, and scandalous matter" in an attempt to cloud the issue of this case. Respondent therefore relies on Sup. Ct. Rule 34.6 and requests that this Petition be disregarded and stricken by the Court.

With all due respect to the Petitioners, the single issue in this case is whether a County Clerk who records a Deed to real property pursuant to a judicial act of a Circuit Judge is liable under 42 U.S.C. 1983?

The doctrine of Judicial Immunity is a well accepted concept adopted by this Court. As early at 1872, this Court held that a Judge should be free to act on his convictions without apprehension and further that this was of highest importance to a proper administration of justice. Bradley v. Fisher, 13 Wall 335, 80 U.S. 335, 20 L.Ed. 646 (1872). Recently, this Court has embodied the concept of Judicial Immunity into 1983 actions unless there was a clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed. 2d 331 (1978), Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967).

In Hendriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981), stated at page 855:

> The doctrine of official immunity from § 1983 is based on two mutually dependent rationales:
>
> (1) the injustice, particularly in absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion;

> (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good. Butz v. Economou, 438 U.S. 478, 497, 98 S.Ct. 2894, 2906, 57 L.Ed.2d 895 (1978), quoting Scheuer v. Rhodes, 416 U.S. 232, 240, 94 S.Ct. 1683, 1688, 40 L.Ed.2d 90 (1974).

In Imbler v. Pachtman, 424 U.S. 409, 419 96 S.Ct. 984, 988, 47 L.Ed 2d 128 (1976) this Court stated:

> An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at the trial.

This immunity which derives from judicial immunity may extend to persons other than a judge where performance of judicial acts or activity as an official aid of the judge is involved. Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), Gravel v. United States, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).

Where a clerk is acting under the command of a court decree of explicit instructions from a judge there is absolute immunity. Williams v. Wood, 612 F.2d 982 (5th Cir. 1980); Slotnick v. Garfinkle, 632 F.2d 163 (1st Cir. 1980), Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973); McLallen v. Henderson, 492 F.2d 1298 (8th Cir. 1974).

This is exactly this case. The County Clerk, A. T. Wood, was duty bound by Kentucky law to record the deed pursuant to KRS 426.575 which states:

> Conveyance by Master Commissioner shall not pass any right, until it has been examined and approved by the court; which approval shall be indorsed on the conveyance and recorded with it.

As stated by Judge Bertelsman in his opinion:

> The mere fact of recording a deed is a ministerial function in which the County Clerk has no discretion. He is certainly not required to review the foreclosure proceedings underlying every Master Commissioner's deed to determine whether they are void. If he were to undertake to perform such a function, he would be constituting himself a de facto court of appeals.

Clearly, A. T. Wood was acting under command of a court decree of June 27, 1977, and when presented with the deed on June 28, 1977, had to accept the deed. The Judge who ordered the sale has Judicial Immunity and clearly the Respondent A. T. Wood has Immunity since he was acting pursuant to a Judicial Sale.

The Respondent, a Kenton County Clerk, is charged with the duty of accepting deeds, mortgages and other instruments. As such, when the Respondent acts pursuant to a command of a court decree or explicit instructions of a Judge there is absolute immunity. Williams v. Wood, 612 F.2d 982 (5th Cir. 1980); Slotnick v. Garfinkle, 632 F.2d 163 (1st Cir. 1980).

The filing of the deed herein was non-discretionary. The Respondent had to accept the deed. KRS 382.110(1).

As stated by Judge Bertelsman, "If the Plaintiff had desired to seek review of the foreclosure proceedings, his remedy was to file an appeal in the Court of Appeals of Kentucky."

CONCLUSION

It is respectfully submitted that both lower courts were clearly correct in their decisions. A. T. Wood as Clerk of the Kenton County Court was performing a ministerial deed in which he had no discretion. The deed was properly executed in accordance with the laws of the Commonwealth of Kentucky and Mr. Wood was required to record the deed pursuant to a Judicial Sale.

The Petition for a Writ of Certiorari should be denied since it does not meet any of the tests under Sup. Ct. Rule 17 (1).

Respectfully submitted,

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